

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ZACKIE THOMAS REED, IV,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Respectfully submitted,

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QUESTION PRESENTED FOR REVIEW

Whether the preponderance of the evidence standard utilized by the United States Court of Appeals for the Fifth Circuit in a supervised release revocation case premised on a Texas state narcotics violation implicates and violates due process as articulated in Black v. Romano, 471 U.S. 606 (1985).

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v.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT:

The Petitioner, ZACKIE THOMAS REED, IV, Appellant in the United States Court of Appeals for the Fifth Circuit and the Defendant in Case No. MO-11-CR-401, submits this Petition for Writ of Certiorari and respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on September 07, 2021.

OPINION BELOW

On September 07, 2021, the United States Court of Appeals for the Fifth Circuit entered its Opinion affirming the revocation of supervision by the United States District Court. A copy of the Opinion is attached as Appendix A.

The District Court's Criminal Judgment from Case No. MO-11-CR-401, United States District Court the Western District of Texas, Midland Division is attached as Appendix B.

JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code sec. 1254(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states, in pertinent part to the case *sub judice*:

No person...shall be deprived of life, liberty, or property, without due process of law...

STATEMENT OF THE CASE

Petitioner had been serving a term of supervised release arising from a conviction in the United States District Court, Western District of Texas in MO-11-CR-401. On or about May 21, 2020, the United States Probation Department in the Western District of Texas, Midland Division filed Petition for Warrant or Summons for Offender Under Supervision (ROA.53-54).

The grounds for the initiation of revocation proceedings stem from a May 20, 2020, traffic stop in Odessa, Ector County, Texas, by the Sheriff's Department Narcotics Division. The Government alleged that the Sheriff's officers found Petitioner had methamphetamine, a pipe, scale and baggies. Petitioner was arrested for Possession of a Controlled Substance under Texas Health and Safety Code and booked into the Ector County Jail in Odessa, Texas.

The Government alleged that Petitioner violated a term of supervision by committing another federal, state or local crime.

On October 23, 2020, the United States District Court, Western District of Texas, Midland Division held a final hearing on the Petition for Warrant for Offender Under Supervision (ROA.797-8). During the hearing, the Petitioner invoked his right against self-incrimination based on the fact that there was a pending Texas state criminal case against him.

During the hearing, the Government did not enter expert opinion testimony, either from chemical or forensic testing, regarding the contraband seized from Petitioner. The Government only called the arresting officer who gave opinion testimony.

The United States District Court sustained the revocation petition and entered an Order Revoking Probation and Resentencing of Defendant (ROA.797-8). Among other things, Petitioner was sentenced to 24 months incarceration in the United States Bureau of Prisons.

On or about November 04, 2020, Petitioner filed a Notice of Appeal, complaining of the revocation.

On September 07, 2021, the United States Court of Appeals for the Fifth Circuit affirmed the District Court's decision.

REASON FOR GRANTING THE WRIT

The preponderance of the evidence standard employed the District Court and the Court of Appeals imposes punishment involving a greater deprivation of liberty than the supervision previously entered and was not fundamentally fair under the Due Process Clause on the ground that the Government did not prove the contraband seized was illegal.

The parameters for the imposition of probation are set by 18 U.S.C. sec. 3561-3566. The decision to revoke is governed by 18 U.S.C. sec. 3565. Johnson v. United States, 529 U.S. 53, 59-60 (2000).

The United States Court of Appeals for the Fifth Circuit holds that revocation is proper if the District Court finds by a preponderance of the evidence that the defendant violated a condition of release. United States v. Spraglin, 418 F.3d 479, 480 (5th Cir. 2005). The evidence and the reasonable inferences from it are reviewed in the light most favorable to the Govern-

ment. United States v. Alaniz-Alaniz, 38 F.3d 788 (5th Cir. 1994). Thus, under the circuit's standard, the revoking court may base a finding of a supervision violation on a preponderance of the evidence. United States v. Grandlund, 71 F.3d 507, 509, n. 2 (5th Cir. 1995).

Review of the revocation of supervision in the United States Court of Appeals for the Fifth Circuit is governed by an abuse of discretion standard. United States v. Fryar, 920 F.2d 252, 258 (5th Cir. 1990). To obtain a reversal of a revocation order on the basis of evidentiary insufficiency, an appellant must show clearly that the revoking court abused its discretion. United States v. King, 990 F.2d 190, 193 (5th Cir. 1993), cert. denied 510 U.S. 881 (1993). However, the Court of Appeals employs a "more likely than not" standard, without reliable chemical or forensic proof.

Supervision may not be revoked in the absence of a threshold determination that there has been a violation of an express or clearly implied condition of probation. As the United States Supreme Court concluded in Douglas v. Buder, 412 U.S. 430 (1973), there is a requirement of due process. At issue in Buder was a revocation of state probation purported to be prompted by violation of a condition that all arrests for any reason must be reported without delay to the probation officer. Because the only evidence at the revocation hearing was that defendant had received but not reported a traffic citation, not arrest under state law, the Court concluded the finding he had violated his probation was devoid of evidentiary support as to be invalid under the due process clause. In Buder, the Court found the petitioner was deprived of due process.

In Gagnon v. Scarpelli, 411 U.S. 778 (1973), the Supreme Court held that a probationer is entitled to a preliminary and final revocation hearing, under the conditions specified in

Morrissey v. Brewer, 408 U.S. 471 (1972).

In Black v. Romano, 471 U.S. 606 (1985), the United States Supreme Court declared that a supervisee has an obvious interest in retaining conditional liberty. Due process requires two distinctive components. First there is a retrospective factual question whether the supervisee has violated a condition of probation. Then, the court determines whether the violation of a condition warrants violation. See Bearden v. Georgia, 461 U.S. 660 (1983).

Here, the Government alleged that Petitioner violated the probation condition of not “committing another federal, state or local crime”. The Government alleged Petitioner violated the Texas Health & Safety Code by possessing a controlled substance. Thus, the first component is implicated here. There was not a sufficient factual determination.

The Government failed to provide as a threshold a controlled substance. Texas state law mandates that the prosecution has the burden of proving that the substance was actually a dangerous drug or controlled substance. Lay testimony is not permitted. Bright v. Texas, 556 S.W.2d 317, 321-322 (Tex.Crim.App. 1977); Manning v. Texas, 637 S.W.2d 941, 943 (Tex. Crim.App. 1982).

This case clearly violates the concept of fundamental fairness within the Due Process Clause as set forth in Buder and then addressed in Black. The parameter set by the Petition was a narcotics violation by a probationer. Fundamental fairness under the Due Process Clause warrants the Government prove the substance was actually a narcotic.

The District Court clearly erred by failing to require the substances seized were actually dangerous drug or illegal narcotics. The Government’s case was premised solely on allegations of Texas state narcotics violation.

Texas state law mandates that in a narcotics case, the narcotics be proven. The Government failed here, and the decision to revoke Petitioner's probation denied her Due Process and denied her liberty greater than the deprivation of the probation.

Petitioner prays for reversal.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that the Petition for Writ of Certiorari should be granted and prays that the Order Revoking Probation be reversed, the sentence of incarceration be vacated and the Petitioner be released from custody.

PRAYER FOR RELIEF

Petitioner, ZACKIE T. REED, requests that this Petition for Writ of Certiorari be granted for the reasons stated and that the conviction entered against him be vacated and this case remanded for consideration of the motion to set aside jury verdict, and such other relief to which Petitioner would be entitled to receive in law or in equity.

Respectfully submitted,

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By: /s/ Steve Hershberger
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Texas State Bar # 09543950

Attorney for Petitioner

APPENDIX A

(Opinion of the United States Court of Appeals, for the Fifth Circuit)

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

September 7, 2021

Lyle W. Cayce
Clerk

No. 20-50937
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

ZACKIE THOMAS REED, IV,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 7:11-CR-401-1

Before HIGGINBOTHAM, JONES, and COSTA, *Circuit Judges*.

PER CURIAM:*

Zackie Thomas Reed, IV, pleaded guilty to three counts of possession of pseudoephedrine knowing that it would be used to manufacture methamphetamine in violation of 21 U.S.C. § 841(c)(2). The district court sentenced him to 120 months of imprisonment—which was later reduced to

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

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100 months—and three years of supervised release. Following a revocation hearing, the district court determined that Reed had violated the conditions of supervision by committing another federal, state, or local crime and by unlawfully possessing a control substance. The district court revoked Reed's supervised release and sentenced him to 24 months of imprisonment with no additional term of supervised release.

On appeal, Reed argues that the evidence was insufficient to show that he unlawfully possessed a controlled substance, methamphetamine. Specifically, he contends that the Government failed to prove by a preponderance of the evidence—either through a field test, laboratory analysis, or competent testimony—that the substance found on his person was in fact methamphetamine.

The district court could revoke Reed's supervised release if it found by a preponderance of the evidence that he violated a condition of his supervised release. *See* 18 U.S.C. § 3583(e)(3); *United States v. Hinson*, 429 F.3d 114, 118-19 (5th Cir. 2005); *see also United States v. Spraglin*, 418 F.3d 479, 481 (5th Cir. 2005). The evidence, and all reasonable inferences drawn from it, when viewed in the light most favorable to the Government, supports that a reasonable trier of fact could conclude that Reed was in possession of a substance that was more likely than not methamphetamine. *See United States v. Alaniz-Alaniz*, 38 F.3d 788, 792 (5th Cir. 1994). Here, the arresting officer testified that he found a clear baggie on Reed's person containing a substance that he believed was methamphetamine based on his training with methamphetamine and experience as an officer of the police department's narcotics unit. The arresting officer also found drug paraphernalia, including a glass methamphetamine pipe and multiple empty baggies, inside Reed's vehicle. Furthermore, prior to the initiation of the traffic stop, the arresting officer observed Reed leaving a residence whose owner was the target of a narcotics investigation.

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The district court thus did not abuse its discretion in revoking Reed's supervised release. *See Spraglin*, 418 F.3d at 480.

AFFIRMED.

APPENDIX B

(Criminal Judgment, United States District Court for the Western District
of Texas, Midland Division)

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION**

UNITED STATES OF AMERICA
Plaintiff

VS

(1) ZACKIE THOMAS REED IV
Defendant

§
§
§
§
§
§
§

Case No. MO-11-CR-00401-DC

**ORDER REVOKING SUPERVISED RELEASE and
RESENTENCING OF DEFENDANT**

On this the October 23, 2020, came on to be heard the Government's Motion for Revocation of Supervised Release granted by virtue of Judgment entered on June 21, 2012, in the above numbered and styled cause.

Defendant appeared in person and was represented by attorney of record, Steve Hershberger. The United States was represented by Assistant United States Attorney, Monica Daniels.

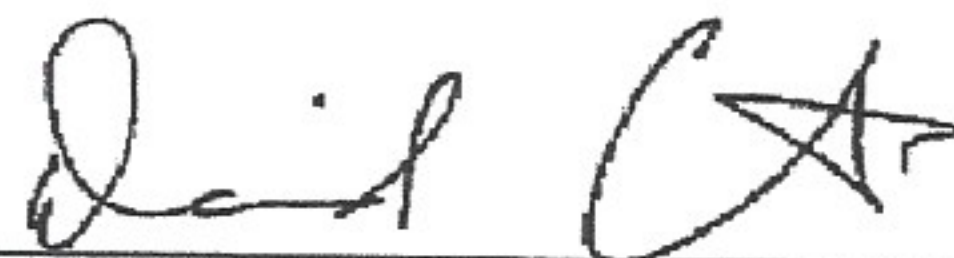
After reviewing the motion and the records in this case as well as hearing testimony and arguments of counsel, the Court is of the opinion that said Defendant has violated the provisions of his Supervised Release and that the ends of justice and the best interests of the public and of the Defendant will not be subserved by continuing said Defendant on Supervised Release. Further, the Court is of the opinion that the Motion for Revocation of Supervised Release should be, and it is hereby **GRANTED**.

IT IS THEREFORE ORDERED that the term of Supervised Release of Defendant named above granted by the Judgment entered on June 21, 2012, and it is hereby **REVOKED** and **SET ASIDE** and the Defendant is resentenced as follows:

The Defendant, **ZACKIE THOMAS REED IV**, is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of Twenty-Four (24) on each count. Term in each count to run concurrent. No further Supervised Release shall be imposed. This term to run consecutive to any sentence imposed in pending Ector County, Texas, case.

The Clerk will provide the United States Marshal Service with a copy of this Order and a copy of the Judgment entered on June 21, 2012, to serve as the commitment of the Defendant.

SIGNED this 2nd day of November, 2020.



David Counts
United States District Judge